# In the
# Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 79-618.

GOOD HOPE REFINERIES, INC.,
PETITIONER,

*v.*

BELIA R. BENAVIDES, FLUMENCIO MUNOZ, EDNA AMADA M. LOZANO, LUIS ANTONIO MUNOZ, AND OMAR ALBERTO MUNOZ,
RESPONDENTS.

**Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.**

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## Question Presented.

Whether § 11(e) of the Bankruptcy Act provides Good Hope Refineries, Inc. (Refineries), an additional 60 days in which to pay delay rentals under the oil and gas lease in question.

## Statutory Provisions Involved.

The only statutory provisions involved are § 11(e) of the Bankruptcy Act, 11 U.S.C. § 29(e), and §§ 402(a) and 403(a) of Title IV of the Bankruptcy Reform Act of 1978, 92 Stat. 2682 and 92 Stat. 2683, respectively, all of which are set forth in Appendix A, which follows page 9.

## Statement of the Case.

The respondents (Benavides), wish to add the following facts to Refineries' statement of the case.

As consideration for Benavides' entering into the oil and gas lease with Refineries rather than with some other potential lessee, Refineries paid Benavides a bonus of $107,000. Under the terms of the oil and gas lease, Refineries had no obligation to drill or to pay delay rental. Only if Refineries wished to continue the lease for an additional one year in the original three-year term would Refineries either have to commence drilling or have to pay delay rental prior to the anniversary date. If Refineries did drill and produce minerals, then the term of the lease would extend until the minerals ceased to be produced in paying quantities.

On October 31, 1975, when Refineries filed its c. XI petition, the Bankruptcy Court entered an order which allowed and still allows Refineries to continue its business operations as debtor in possession.

In accordance with long-standing Texas oil and gas practice and law, Benavides declined the late delay rental.

The District Court held that there was nothing in the Bankruptcy Act to enable Refineries to cure its failure (not default) to pay the delay rental timely, and with good tender.

The First Circuit affirmed on the same grounds.



## Argument.

The Court should deny the petition for a number of reasons.

First, the factual and legal situation of the case is probably unique. It is unlikely to occur again.

The primary statute at issue, the second sentence of § 11(e), hereinafter referred to as § 11(e), enacted in 1938, has been supplanted by § 108(b) of the Bankruptcy Code with respect to all bankruptcy cases filed on or after October 1, 1979.[1] Under the savings clause of the Bankruptcy Reform Act of 1978, § 11(e) will be controlling only in the ever-dwindling number of open bankruptcy cases filed before October 1, 1979.[2] Thus, § 108(b) is irrelevant to the case at hand.

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[1] Section 402(a) of Title IV of the Bankruptcy Reform Act of 1978, 92 Stat. 2682, provides:

> "Except as otherwise provided in this title, this Act shall take effect on October 1, 1979."

Section 401(a) of Title IV of the Bankruptcy Reform Act of 1978, 92 Stat. 2682, provides:

> "The Bankruptcy Act is repealed."

[2] Section 403(a) of Title IV of the Bankruptcy Reform Act of 1978, 92 Stat. 2682, provides:

> "A case commenced under the Bankruptcy Act, and all matters and proceedings in or relating to any such case, shall be conducted and determined under such Act as if this Act had not been enacted, and the substantive rights of parties in connection with any such bankruptcy case, matter, or proceeding shall continue to be governed by the law applicable to such case, matter, or proceeding as if the Act had not been enacted."

With reference to section 403(a), the Senate Report stated:

> "Subsection (a) makes it clear that the provisions of this act are not to affect cases commenced under prior law, which are to proceed, with

Combined with the phasing out of § 11(e) is the highly structured, sophisticated relationship between the parties as embodied in the oil and gas lease, a document that has evolved from a century of oil and gas production in Texas and has become formalized and defined through Texas case law.

The parties agree that Texas law applies to the issue of their relationship under the oil and gas lease and that these principles of law are well-settled.

Under these principles, the oil and gas lease is not a lease or a contract but rather the grant of a determinable fee in the subject mineral rights. The term "oil and gas lease" is a misnomer. In 7 *Texas Law Review*, 538 (1930), Professor A. W. Walker in a series of articles entitled, "The Nature of Property Interests Created by an Oil and Gas Lease in Texas," states, at pp. 553-554:

> "Since a determinable fee estate is nothing but a fee simple estate subject to one or more special limitations and has all the qualities of a fee simple estate so long as it endures the term 'lease' and the appellation of 'lessor' and 'lessee,' as well as the term 'assignment' and the appellations of 'assignor' and assignee,' as used in connection with the execution and conveyance of determinable fee estates in oil and gas are *misnomers* [emphasis supplied]. . . . Actually, under the decisions in this state, the so-called oil and gas 'lease' is a *conveyance* [emphasis in original] of the title to the minerals in place subject to certain special limitations which render, what would otherwise have been an absolute fee simple, a determinable fee."

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respect to both substantive and procedural matters, in the same fashion as though this act were not in effect."

Senate Report (Judiciary Committee) No. 95-989, 95th Cong., 2d Sess. 166, July 14, 1978.



In its petition, Refineries states that § 70(b) of the Bankruptcy Act is one of the statutes involved in this case. Without ever so stating, Refineries implies that the oil and gas lease is an executory contract. Under the well-established law of Texas, the oil and gas lease is the grant of a determinable fee.[3] A grant is not an executory contract. It is fundamental property law that ". . . a grant is a contract executed. . . ." *Fletcher* v. *Peck*, 6 Cranch 87, 137 (1810). Thus, § 70(b) of the Bankruptcy Act, like § 108(b) of the Bankruptcy Code, is irrelevant to this case.

It is well-settled Texas practice and Texas law that the payment of a delay rental under an oil and gas lease by check must be by a check that is in fact good. *Nelson Bunker Hunt Trust Estate* v. *Jarmon*, 345 S.W.2d 579, 581 (Tex. Civ. App. 1961). It is the common and prudent practice, if paying by personal check, to send the check 30 days before the anniversary date so that if the check is dishonored, there will be sufficient time to make the check good. Refineries took the calculated risk of not having sufficient time to make its check good when it tendered its personal check just 8 days before the anniversary date. Few people take such risks.

Second, this is not a case where the decision of the First Circuit is in variance with a decision of the Court or in conflict with other Circuit Courts of Appeals. Supreme Court Rule 19(b).

In the 40-year history of § 11(e), the Court has never interpreted the part of the statute in question. It appears that the Court has interpreted only the first sentence of § 11(e) and only upon two occasions. *Herget* v. *Central National Bank & Trust Co.*, 324 U.S. 4 (1945); and *Meyer* v. *Fleming*, 327 U.S.

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[3] *Texas Co.* v. *Daugherty*, 107 Tex. 226, 238 (1915). *Stephens County* v. *Mid-Kansas Oil & Gas Co.*, 113 Tex. 160, 164 (1923). *Kaiser* v. *Love*, 163 Tex. 558, 560 (1962).

161 (1946). The only other time the Court appears to have referred to § 11(e) was in a footnote in *Williams* v. *Austrian*, 331 U.S. 642 (1947), where the statute was mentioned in a discussion concerning the definition of "proceeding." *Id.* at 658-659, n.42.

In the same 40 years, there appear to have been only two Circuit Court of Appeals cases dealing with the second sentence of § 11(e). In *Thomas J. Grosso Investment, Inc.* v. *Federal Savings & Loan Ins. Corp.*, 457 F.2d 168 (9th Cir. 1972), the Ninth Circuit was interpreting § 11(e) with respect to a factual situation completely unlike the case at hand. In *Schokbeton Industries, Inc.* v. *Schokbeton Products Corp.*, 466 F. 2d 171 (5th Cir. 1972), the Fifth Circuit dealt with a fact situation somewhat more similar to that of the case at hand. The First Circuit, in the decision below, followed the rationale of the Fifth Circuit.

Third, Refineries asserts in its petition that this statute, under which only two Circuit Court of Appeals cases have arisen in the course of 40 years, is "admittedly ambiguous."

The sentence is admittedly lengthy but, like all properly constructed and grammatically correct sentences, it consists of only a subject, verb, and object, each with modifying phrases. In essence, where either of two combinations of certain conditions has occurred, ". . . the receiver or trustee may . . . take any such action. . . ." The two combinations of conditions allowing the application of the statute are set forth at the beginning of the statute.

The Ninth Circuit in *Grosso Investment, supra*, dealt with one of the combinations of conditions:

> "'. . . where in any proceeding, judicial or otherwise, a period of limitation is fixed, either in such proceeding or by applicable Federal or State law, for taking any action,



> filing any claim or pleading or doing any act, and where in any such case such period had not expired at the date of the filing of the petition in bankruptcy, the . . . trustee . . . may take any such action. . . .'" *Id.* at 172.

The Fifth Circuit in *Schokbeton, supra*, dealt with the other combination of conditions:

> "'Where, by any agreement, a period of limitation is fixed for instituting a suit or proceeding upon any claim, or for presenting or filing any claims, proof of claim, proof of loss, demand, notice or the like, . . . and where in any such case such period had not expired at the date of the filing of the petition in bankruptcy, the receiver or trustee . . . may take any such action. . . .'" *Id.* at 176.

Obviously, this part of § 11(e) contemplates an existing claim of the debtor at the time of the filing of the petition but the facts of this case are such that no claim exists between the parties. Thus, § 11(e) does not apply to this case.

Furthermore, no court has found this language to be ambiguous.

Fourth, Refineries asserts in its petition a sweeping, startling, and novel interpretation of § 11(e) which does not seem to have appeared in any case or authority during the 40-year history of the statute. In essence, Refineries' interpretation of the statute is that it freezes the status-quo of the debtor's affairs for 60 days from the date of filing of the petition, during which time Refineries may do any act to further its interests.

As the only authority for this novel interpretation, Refineries cites the testimony of Mr. David Teitelbaum representing the Bankruptcy Committee of the New York Bar Association

during the hearings held before the House Judiciary Committee in June 1937 concerning revision of the Bankruptcy Act.[4]

Refineries does not cite any legislative reports or statements of committee or statements of legislators. This Court has stated,

> ". . . where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended."[5]

Thus, there is no need to resort to the legislative history of § 11(e) since § 11(e) is clear and unambiguous.

Finally, those other reasons given as examples in Rule 19 of the matters considered by the Court in determining whether to exercise its discretion in granting a writ of certiorari have no application to this case.

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[4]Mr. Teitelbaum testified for three days before the committee. Refineries quotes from Mr. Teitelbaum's testimony on the first two days. On the third day, Mr. Teitelbaum was asked by the committee for his further comments on the proposed act. It is interesting to note that Mr. Teitelbaum prefixed his remarks as follows:

> "When I had the privilege of being heard by this Committee before, I spoke as the representative of the members of the bankruptcy committee of the association of the bar of the City of New York. My commission in that capacity was limited to the old Bankruptcy Act and *did not cover corporate reorganizations.*" (Emphasis supplied.)

Proposed Amendments to the Bankruptcy Act: Hearings on H.R. 6439 before the House of Representatives, Committee on the Judiciary, 75th Congress, 319, June 8, 1937.

[5]*United States* v. *Missouri Pacific R.R. Co.*, 278 U.S. 269, 278 (1929).



**Conclusion.**

For these reasons, the petition for a writ of certiorari to the First Circuit Court of Appeals should be denied.

Respectfully submitted,

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## Appendix A.

BANKRUPTCY ACT, SECTION 11(e), 11 U.S.C. § 29(e).

e. A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy. Where, by any agreement, a period of limitation is fixed for instituting a suit or proceeding upon any claim, or for presenting or filing any claim, proof of claim, proof of loss, demand, notice, or the like, or where in any proceeding, judicial or otherwise, a period of limitation is fixed, either in such proceeding or by applicable Federal or State law, for taking any action, filing any claim or pleading, or doing any act, and where in any such case such period had not expired at the date of the filing of the petition in bankruptcy, the receiver or trustee of the bankrupt may, for the benefit of the estate, take any such action or do any such act, required of or permitted to the bankrupt, within a period of sixty days subsequent to the date of adjudication or within such further period as may be permitted by the agreement or in the proceeding or by applicable Federal or State law as the case may be.

TITLE IV OF THE BANKRUPTCY REFORM ACT OF 1978,
PUB. L. 95-598 (92 STAT. 2682).

§ 401. (a) The Bankruptcy Act is repealed.

. . . . . .

§ 402. (a) Except as otherwise provided in this title, this Act shall take effect on October 1, 1979.

. . . . . .

(92 STAT. 2683.)

. . . . . .

§ 403. (a) A case commenced under the Bankruptcy Act, and all matters and proceedings in or relating to any such case, shall be conducted and determined under such Act as if this Act had not been enacted, and the substantive rights of parties in connection with any such bankruptcy case, matter, or proceeding shall continue to be governed by the law applicable to such case, matter, or proceeding as if the Act had not been enacted.

. . . . . .